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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 374

EASTERN AIR LINES, INC.,

Petitioner,

v.

JOSEPHINE St. CLAIR, as Executrix of the Estate of HAROLD W. St. CLAIR, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Court of Appeals is reported in 279 F. 2d 119 and is reprinted at pages 6 through 13 of the appendix annexed to the petition.

JURISDICTION

None of the factors enumerated in Rule 19 1(b), Rules of the Supreme Court, is present to support the granting of the writ. What petitioner seeks to accomplish is to obtain a second appeal without justification therefor. The decision of the Court of Appeals is not in conflict with that

of any Court in the District of Columbia or any other Court, federal or state.

The "questions" presented by the petitioner do not present any important question of state or federal law or any conflict which should be resolved by this Court.

QUESTIONS PRESENTED BY PETITIONER

(1) In this action for wrongful death were (a) respondent's knowledge of the marital status of the decedent upon their initial acquaintanceship and (b) *all* of the personal habits and qualities of decedent, howsoever unrelated to his earning power and possible contributions to his family, proper subjects of inquiry by petitioner?

(2) Was it proper for the petitioner to read from the deposition of Stoller[1] questions addressed to him which (a) were unanswered and (b) contained inquiry as to alleged prior inconsistent statements claimed by the inter-

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[1] The reference to Stoller as "respondent's witness" at Petition p. 3. is not accurate. While Stoller's deposition was read into the record by respondent (Rule 26(d) Rules of Civil Procedure) his examination was taken on behalf of the petitioner in which a Mr. Clark, an Assistant U. S. Attorney, participated (A 78; A 80).

The entire inquiry of Stoller relative to the subject of St. Clair's being observed under the influence of alcohol was introduced by petitioner of its own witness Stoller (A 80). Stoller persistently and consistently denied the truth of the subject matter of such of the questions as he answered (A 83-90).

The letter "A" is used to designate the appendices filed in the Court below. The appellant's appendix (white cover) comprises pages A 1-132 and respondent's appendix (gray cover) comprises pages A 133-334.

rogator to have been made to an F. B. I. agent by the name of Brady, without producing Brady or without producing any written or other proof that such statements were in fact made?

(3) In the light of the consistent denials by Stoller of having made any statements to F. B. I. agent Brady concerning St. Clair being under the influence of alcohol—and no evidence being proffered by petitioner that he had made such statements—was it proper for the trial court (a) to deny the request to charge the jury that it may not infer from the fact that a question is asked and answered in the negative that there is any truth to the matter set forth in the question (A 111) and (b) to charge thereon "*Whether he* [Stoller] *did or not* [make the statements incorporated in the questions which he denied] *is entirely up to you and within your sole and exclusive province.*" (A 122)?

STATEMENT OF THE CASE

Since petitioner has extensively alluded to the testimony, respondent ventures likewise to make reference thereto.

After a trial to a jury in the United States Court for the Southern District of New York, a verdict was rendered in favor of respondent against petitioner in the sum of $24,000, allocating the damage in accordance with the requirements of the District of Columbia Code, §16-1203 [21:3] as follows: $15,000 to Josephine A. St. Clair, the widow, and $9,000 to Claire St. Clair, the decedent's

daughter (A 101). A motion made by respondent to set aside the verdict and for a new trial was denied (A 126-130).

There is no question that Harold W. St. Clair, the deceased, had been hospitalized early in 1949 on two occasions, for a total of about six or seven days, in Miami, Florida, at a time when he was in a state of nervousness (A 96) while he was in the process of being divorced from his wife Helen and when he was undergoing business problems which affected him emotionally (A 92; A 95-97).

His physician, Dr. Fortner, found him to be in a state of extreme nervousness and restlessness and invited him to go down to his employer's office and straighten out some of his business affairs (A 94-95; A 99). Dr. Fortner further testified that some people who are emotionally upset do drink under those conditions and that St. Clair seemed to be emotionally upset (A 96). He would not, however, call decedent a chronic alcoholic (A 94).[2]

There is no question, also, that decedent had been hospitalized in the early part of 1949 in Newark, New Jersey, and in New York City, and that in all instances the clinical diagnosis for his stay was alcoholism.

It is to be noted particularly that none of those with whom and by whom decedent was employed ever saw him

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[2] The reference at footnote 7 (Pet. 23) to Dr. Fortner as "respondent's witness" is likewise erroneous. Dr. Fortner was examined at the instance of his deposition taken "by the defendant Eastern Air Lines" in South Miami, Florida (A 90) and his deposition was read into the record by respondent's counsel. See also *St. Clair* v. *Eastern Air Lines*, 24 F. R. D. 330.

under the influence of liquor nor did they ever see him take a drink, although several of them had visited with him socially and notwitstanding on those occasions others did drink (see testimony of witnesses Gale, A 56; Hart, A 62; Stoller, A 80).

Edward Scribner, President of Resolute Insurance Company, testified that in or about July 1946 when he (Scribner) was Executive Vice President of Stuyvesant Insurance Company, decedent came to work for that company as Secretary and Treasurer; that decedent's performance on the job was good and that he was a good administrator (A 69) and that Scribner regarded him as a competent insurance man (A 70).

Philip Stoller, President of American Bankers Insurance Company of Florida and Treasurer of the National Insurance Agency (A 71) testified that in 1948 decedent was employed by Retrospective Insurance Underwriters as Executive Vice President, by Credit Insurance Underwriters as Executive Vice President, by National Insurance Agency, Inc. as Executive Vice President and by the American Bankers Insurance Company as President (A 72). The foregoing companies constituted the Landon Group (A 76).

Decedent had a formidable history of employment and of steadily increasing earnings in his field of endeavor—the insurance business.

At one time he had been a Deputy or Assistant Deputy Commissioner of Banking and Insurance of the State of New Jersey (A 82).

Between July 1945 and June 1946 he was employed by the Railroad Insurance Association [inaccurately described as Railroad Insurance Underwriters] as Chief Accountant and earned $6500 a year (A 53).

In June 1946 he became associated with the Stuyvesant Insurance Company as Secretary and Treasurer where he started at $6750 and on January 1, 1947 his salary was increased to $8000 [we assume, per annum] (A 55-57).

On September 19, 1947 he resigned his post of his own accord to accept a post with the group of companies making up the Landon Group (A 57).

During 1948 St. Clair earned $15,600 (A 74). From January 1, 1949 to April 15, 1949 he earned $6,250 (A 74).

ARGUMENT

The Court of Appeals has the power to correct an obviously monstrous verdict by reversal and direction of a new trial.

The right to correct an obviously unjust result in the court below is inherent in the Court of Appeals. When it is apparent that such a result was arrived at because of passion aroused by the introduction in evidence of improper proof and by the abuse of the trial court's discretion in refusing to set aside the verdict and to direct a new trial the Court of Appeals has the power to reverse the judgment and direct a new trial.

In *Butler* v. *General Motors Corporation*, 240 F. 2d 92, 94 (2 Cir. 1957) the Court held that it has such power.

stating that while generally it would refuse to reverse the trial court's denial of the new trial because of excessiveness or inadequacy of damages awarded by a jury "* * * we might depart from the rule if the award was sufficiently 'monstrous',—see *Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 101, 70 S. Ct. 509, 94 L. Ed. 683 * * *."

This power was exercised in *Bainbrich* v. *Hammond Iron Works*, 249 F. 2d 348, 349 (10 Cir. 1957) and *United States* v. *Prendergast*, 241 F. 2d 687, 689 (4 Cir. 1957).

While the last two authorities cited have to do with claimed excessive verdicts, we believe the rule enunciated to be equally applicable to an inadequate verdict.

The out-of-pocket expenses by the respondent for funeral expenses and flowers was $1,815.43 (A 33-34) (this under the applicable statute [Pet. 4][3] was to be included in the verdict). The verdict allowed to the widow $15,000 gross (A 101). The net compensatory damage allowed to the widow therefore was $13,184.57. Such a sum commuted on an interest basis of 4% per annum (the discount agreed upon [A 121]) would allow the widow approximately $912 a year for 22 years (the minimum period charged by the Court as representing the life expectancy of decedent [A 120]).

Such a verdict is a classic example of monstrousness.

The Trial Judge himself indicated that he might personally disagree with the quantum of damages (A 129).

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[3] Pet. 4 and similar references refer to pages of the Petition.

The paucity of the verdict can only be attributed to the passion engendered in the minds of the jurors by the introduction by petitioner of wholly irrelevant testimony to which the Court of Appeals in its opinion alluded. The inflammatory observations unsupported by facts not only were presented to the jury, compounded on occasion by the trial court (A 35-37; A 44-45), but also were continued in the brief filed in the court below, and have even been persisted in here.[4]

The footnote (2) appearing at page 6 of the Petition is deserving of some comment. No part of said judgment has been collected by respondent. It would seem to be the rule, at least in the Second Circuit, that dual collection is not permitted. While respondent is not in accord with that view it seems to have been so held in an identical situation (*Cook* v. *U. S. A.*, 274 F. 2d 689).

The decision of the Court of Appeals is not in conflict with any decision in the District of Columbia or in any other court, state or federal. No important question of state or federal law has been presented which should be resolved by this Court.

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[4] Vide: Pet. 12 at which it is stated:

> "Since an element of respondent's pecuniary loss is the probable future continuance of the marriage, the following extract of testimony of the respondent, it is submitted, establishes most eloquently the mockery of the marriage which was about to be entered into between Josephine DePaola [the respondent] and the decedent * * *."

an observation which is neither factually supported nor can be deduced from the testimony nor has any support in law. The fact remains that respondent is the widow of decedent.

There does not appear to be any conflict between the holding of the Court of Appeals in this case as to the law of the District of Columbia in prescribing limitations beyond which petitioner should not go in presenting matter as to decedent's habits and proclivities unrelated entirely to his earning power and future possibilities of improving it, and any other decision. None of the authorities cited by petitioner is at variance with the holding of the Court of Appeals, i.e., that the proof proffered as to certain facets of decedent's habits and character must have some relationship to his earning power. If there were not such a restriction the practice attempted to be pursued in the instant case could be extended beyond all limits of reason and justice.

The Court of Appeals in its opinion has gone to great lengths in analyzing the "questions" in their proper frame of reference and in its opinion has logically and practically disposed of them.

Respondent was not entirely mute during the course of the trial. Respondent did not, however, raise any supertechnical objections to the testimony concerning the initial meeting of the decedent with respondent, his widow, until the bounds of propriety and relevance seemed to have been breached. Objections were, however, made to questions at A 172; A 174-175; A 229-230; A 231.

It is particularly noteworthy, also, that the court allowed questions on (and indeed itself gave some emphasis to) the subject of alleged residence by decedent at the address where his widow lived before they were married.

"Q. I am going to ask you to tell his Honor and the jury do you still say to this jury that Harold St. Clair didn't live at the same number or at your apartment or at 310 East 44th Street before you were married. A. I still—

Mr. Ticktin: I object to the question, may it please the Court. It is immaterial, and let us say further that he did live there and he consorted with this now widow of his, what right is there of the Eastern Air Lines to bring this out and vilify this dead man's character?

The Court: Is that an objection, counsel?

Mr. Ticktin: It is an objection, sir.

The Court: I will overrule it.

All right. Shall we consider it a stipulation?

Mr. Ticktin: Oh, no, sir. I said assuming that.

The Court: Oh, I am sorry.

The question is allowed.

Do you still say, madam, that he did not live at that address on East 44th Street?

The Witness: I still say he did not live at that address." (A 52)

The answer to the question, both of which are quoted at page 21 of the Petition, was perfectly consistent with what appeared elsewhere in the testimony. The question was whether at any time "previous or *subsequent*" to the marriage St. Clair lived at an apartment at 310 East 44th Street. The answer is perfectly consistent with what appears at page 22 of the Petition, and with the following:

"Q. And then when he came up to New York from Florida you met him again? A. Yes.

Q. When was that? A. That would be about the middle of May '49.

Q. And he lived at the Roosevelt Hotel, so far as you knew? A. Yes.

Q. And you married him on July 9th? A. Yes, that's true.

Q. And did he come to live in your apartment? A. Yes he did." (A 144)

and

"Q. As a matter of fact, wasn't he living at your address in 44th Street? (90) A. *After we were married, yes.*

Q. *Not before?* A. *No.*

Mr. Reilly: May I see the exhibit, the marriage license?

The Clerk: Plaintiff's Exhibit 1.

(Mr. Ticktin hands to Mr. Reilly.)

Mr. Reilly: May I read from that—Plaintiff's Exhibit 1. It is an affidavit for license to marry and it is dated July 8th, 1949, State of New York, County of New York, Borough of Manhattan, and it is Harold W. St. Clair and Josephine—and the question is, 'Full name: Harold William St. Clair.'

Q. I take it that was his name? A. Yes.

Mr. Reilly: 'Place of residence, 310 East 44th Street.'

Q. May I ask you, Mrs. St. Clair, if that is the address of the apartment that you refer to as the Beaux Arts? A. Yes.

Q. Now, I want you to tell his Honor and the jury, to your knowledge, did he have any apartment at 310 East 44th Street— (91) A. *Not previous to my—*" (A 181)

Other questions were asked which ran far afield from any legitimate line of inquiry and, notwithstanding objections, were allowed (A 195; A 213).

No authority holds that there is no limit to the area of inquiry under the guise of exploring into the "habits" of a decedent. Conceivably, if petitioner's theory is correct, the limits would be bounded by no restrictions of logic, relevancy or otherwise. To follow petitioner's reasoning, in a death action decedent's religion, his political and economic beliefs, the clothing he wore, and his intimate personal life—howsoever unrelated to his earning power and his contributions to his family—might be spread upon the record under the guise of an exploration into decedent's "habits" (but primarily for the purpose of inflaming the passions of some segment of the jury).

If the emotional impact of decedent's death upon his next of kin may not be adverted to—since only the financial loss may be considered (A 120)—lest the jury may be unduly influenced thereby and render an improvident award (*Hord* v. *National Homeopathic Hospital*, 102 F. Supp. 792, 794 (D. C. D. C. 1952) affd. 204 F. 2d 397 (C. A. D. C. 1952)) surely the converse must be true, that facets of decedent's life which do not relate to decedent's earning power and his prospective contribution to his next of kin, but are introduced merely for their inflammatory appeal, should not be acceptable in evidence.

It is all too evident, and the Court of Appeals so found, that the prejudicial matter paraded before the jury not only was an attempt to, and in fact did, redound to the detriment of respondent's case but had the tendency as well of attempting to paint the respondent herself in an ill light. By the introduction of such evidence as had remote evidentiary value (P. 10 of Appendix attached to Petition) the reac-

tion of the jury could very well have been to penalize the respondent. However, we must bear in mind that the infant child had an interest in the outcome of this action (Pet. 5; A 125); and would likewise suffer the effects of the penalty.

Notwithstanding that the testimony is that the witness Stoller had made no statement to an F. B. I. agent, the trial court permitted the jury to decide whether such statement [i.e. one alluded to in the questions asked] in fact had been made.

Petitioner's counsel in interrogating its witness Stoller (A 80) read a series of questions wherein the witness was asked whether or not he recalled having been interviewed by John Brady, an agent of the Federal Bureau of Investigation, on or about November 13, 1957, which the witness said he did. Reading further, counsel asked the witness whether he had made a statement to Mr. Brady to the effect that there were occasions when Mr. St. Clair would be unable to sign checks because of an alcoholic condition. The witness responded "I never made the statement" (A 83-84). Counsel for petitioner, knowing full well what the transcript of the witness' testimony contained, persisted in reading the questions further (A 84):

> "Q .Did you make any statement at all? A. I never made any statement—anything pertaining to Mr. St. Clair's condition, to the best of my knowledge."

Similar questions, which were unanswered in the deposition, were read by petitioner's counsel (A 84) and were

repeatedly read (A 85-87) resulting in the final question (A 88-89):

> "Did you ever make that statement * * *? A. I never made that statement."

Repeatedly and in different forms the subject was belabored. The witness consistently denied the assertion or any intimation that he had made any such statement or any similar statement to Brady. The court allowed a continuing exception to this line of questions (A 87-89). The questions were persisted in, even though there were no answers thereto in the deposition.

In the discussion with the court relative to the proposed charge, respondent's counsel stated to the court as follows:

> "Mr. Ticktin: I ask your Honor to charge as follows: In the absence of any proof to the contrary, the jury may not infer from the fact that a question is asked and answered in the negative that there is any truth to the matter set forth in the question.
>
> The Court: I will deny that specific request and this is what I am going to say about it * * *."

To this an exception was taken (A 118). The Court charged as follows:

> "There has been some testimony read to you in which a witness was asked whether or not he made a statement to an F. B. I. agent, and he testified that he did not. But no evidence has been introduced to contradict that witness nor to prove that he did in fact make such a statement. *Whether he did or not is entirely up to you and within your sole an exclusive province.*

> "The fact that the F. B. I. agent was not produced or the alleged statement was not produced could seem to me to have an important bearing in determining the credibility of the witness's answer." (italics ours) (A 122)

Additionally, so much of the charge as did not conform to the Requests to Charge a blanket exception was taken (A 123).

No proof whatsoever was adduced by petitioner to show that decedent had been unable to sign checks because he was under the influence of liquor or that Stoller so stated to Brady. However, by the court's charge the jury was permitted to determine "whether or not the statement was made" (A 122).

During argument on the motion to set aside the verdict (A 127) the court's attention was called to this error, respondent's counsel citing the case of *Roge* v. *Valentine*, 280 N. Y. 268, 270, and other authorities to the same effect, stating:

> "I contend, your Honor, that even if Mr. Brady had been produced and had testified to prior contradictory statements made by the witness Stoller, it would still be no question for the jury to determine because that would not have presented any evidence, affirmative evidence of the question." (A 128)

It is significant to observe that no witness testified to having ever seen decedent either drinking or under the influence of liquor on the job. By the court's charge the jury was permitted to infer—in the absence of any evidence, credible or otherwise—that the statements purported to have been made as incorporated in the questions.

which were denied, were in fact made, thereby dissipating all the affirmative testimony to the effect that such was not the fact. In indulging in such an assumption it follows that the fact [that decedent could not sign checks because he was under the influence of alcohol] would then have become established in the minds of the jury. So that by this extraordinary stratagem a fact could be established *without any supporting evidence* whatsoever.

It must be here stressed further that had Brady in fact been produced and had Brady contradicted Stoller by stating that Stoller had made such a statement to him on some prior occasion, the subject matter thus projected would have presented a perfect vacuum, in that such would not have constituted affirmative proof of the fact. *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285 (2 Cir. 1950); *People* v. *Ferraro*, 293 N. Y. 51, 55 N. E. 2d 861; *Roge* v. *Valentine*, 280 N. Y. 268, 20 N. E. 2d 751.

As stated by the Court of Appeals, the resulting harm was not cured by the other parts of the charge. The court should have adopted respondent's Request to Charge in its entirety (A 111). Anything less could not suffice. *Behrman* v. *Sims*, 157 F. 2d 862 (C. A. D. C. 1946).

In *People* v. *Jackson*, 7 N. Y. 2d 142 (1959) the appellant Jackson was being tried for robbery of a liquor store. There was some question as to proper identification. During the course of summation the District Attorney assured the jury that Patrick [the one who allegedly identified the

witness at the trial] *had* "recognized" the appellant in the line-up and that, although "he didn't" pick him out there was good reason for this, adding "I would be more than happy to tell you * * * why after this trial is over."

The court, by Fuld, J., writing for the majority, stated, at page 144:

> "This was a serious impropriety, an error both egregious and inexcusable, whose potential for prejudice was incalculable (See, e.g., *People* v. *Lovello*, 1 N Y 2d 436, 438-489; *People* v. *Tassiclo*, 300 N. Y. 425, 430, see also *People* v. *Ochs*, 3 N. Y. 2d 57-58)."

It was urged by the People, as it is here by petitioner, that the impropriety was "harmless." On this subject Judge Fuld stated (p. 144):

> "It is urged that this impropriety was 'harmless' because it had not been repeated, because it had been 'confined to a single isolated instance' in a case where there was 'overwhelming evidence of guilt' (opinion of Dye, J., p. 146).
>
> "We cannot agree with this evaluation of the proof."

Notwithstanding that the trial court in the *Jackson* case sustained the objection to the reference and followed that "by a prompt, clear and adequate instruction to the jury to disregard [the reference]" and in addition granted the defendant's request to charge in respect thereto (p. 146), the majority of the court regarded the potential for prejudice as incalculable and the conviction was consequently reversed.

How much more harmful was the instruction to the jury in the instant case to draw an affirmative fact out of a vacuum and upon such a foundation of sand to permit it to build another fact.

Notwithstanding the discussion by the Court of Appeals in its opinion of the introduction by petitioner of prejudicial irrelevant matter (Pp. 7-10 of Appendix attached to Petition), the Court of Appeals indicated that the error in permitting the reading at the trial by petitioner's counsel of the questions put to the witness Stoller by Assistant U. S. Attorney Clark, and in the related charge and refusal to charge, were in themselves sufficiently prejudicial to require reversal (P. 13 of Appendix attached to Petition).

It must be observed here, too, that many additional matters were presented to the Court of Appeals by respondent warranting reversal. The Court, however, regarded this latter issue as being paramount.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

David A. Ticktin,
Counsel for Respondent.

Powers Kaplan & Berger,
Of Counsel.

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